

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 13Apr2001

Case No: 2000-LHC-1627

OWCP No: 6-180185

In the Matter of:

ERICK RONALDO LEMUS,
Claimant,

v.

MOBRO MARINE, INCORPORATED
Employer.

Appearances:

Daniel J. Glary, Esq.
For Claimant

Michael C. Crumpler, Esq.
For Employer/Carrier

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the act") as amended, 33 U.S.C. 901 et seq. Claimant, Erick Ronaldo Lemus, argues that he contracted occupational asthma due to a work-related injury on January 16, 1999 and that his condition reached maximum medical improvement (MMI) on December 6, 1999. He seeks temporary partial disability benefits from January 16, 1999 to December 6, 1999 and permanent partial disability benefits from December 6, 1999 and continuing. He also seeks medical benefits under section 7 for future treatment by a pulmonologist for his alleged occupational asthma.

Employer Mobro Marine, Inc. and Carrier AIG Insurance Services (collectively referred to as "Employer") argue that Claimant's actual date of injury was January 21, 1999. Employer further asserts that Claimant has suffered no loss of earning capacity due to any work-related injury. Employer contends that Claimant suffered from costochondritis and pleurisy, reached MMI for these conditions on February 23, 1999, and suffered no disability after that date. Furthermore, Employer asserts that it offered Claimant light duty work as suitable alternative employment, which he either refused to perform or failed to perform adequately. Therefore, Employer argues that it is not liable to Claimant for any benefits or medical treatment.

A formal hearing in this case was held on September 29, 2000 in Jacksonville, Florida. All parties were afforded a full opportunity to present evidence and argument as provided for by statute and regulation. The parties submitted stipulations, which were admitted as joint exhibit 1 (JX 1, Tr. 8-9).¹ The parties jointly offered trial exhibits 1 through 31 (Tr. 18-9, 105). All exhibits were admitted into evidence, including EX 19 and EX 20, which were admitted over Claimant's objection (Tr. 19, 105). Both parties submitted post-hearing briefs. The findings and conclusions that follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

Employer and Claimant have stipulated to and I find the following:

1. Claimant suffered a compensable injury on either 1/16/99 or 1/21/99 while engaged in maritime employment for Employer.
2. The U.S. Department of Labor (DOL) has subject matter jurisdiction of this claim pursuant to the Longshore and Harbor Workers' Compensation Act and personal jurisdiction over the parties.
3. At the time of Claimant's injury, his average weekly wage was \$539.85 if the 1/16/99 date of accident applies, or \$534.79 if the 1/21/99 date applies.
4. Employer/Carrier authorized treatment for Claimant's injury by Joseph Czerkowski, M.D. (Baptist/St. Vincent's Occupational Health); Dr. James

¹ The following are references to the record:
JX - Joint exhibit
Ex. - Trial exhibits (submitted jointly by the parties)
Tr. - Transcript of hearing

Lovett, M.D., Larry Mattingly, D.O. (Premier Family Care); and Baptist Hospital (Beaches). Claimant's examinations by University Medical Center and Wendell Williams, M.D. were unauthorized.

5. Employer/Carrier has paid no indemnity benefits to Claimant.
6. Claimant has earned the following gross wages since his date of accident:

Mobro Marine, Inc.	1/17/99 - 1/23/99	\$ 187.00
	1/24/99 - 2/4/99	\$ 154.00
M/V Marine, Inc.	3/15/99 - 5/6/99	\$3,654.75
Thompson Awning & Shutter Co.	5/18/99 - 5/23/99	\$ 444.00
Sunshine Companies, II, Inc.	6/2/99 - 7/10/99	\$1,253.13
Genuine Parts Co. (NAPA)	8/21/99 - 4/29/00	\$8,691.61
South Central Marine Service, Inc.	5/5/00 - 8/24/00	\$6,080.00
Roberts Diesel Service, Inc.	8/17/00 - 9/14/00	\$1,600.00

7. The deposition transcripts of Ronald Wolter (MD Moody/Mobro Marine); Sharon Johns (MD Moody/Mobro Marine); Vicki Gurliaccio (M/V Marine); Michael Gurliaccio (M/V Marine); Gerd Weidler (Thompson Awning and Shutter); Lisa Wagner (Unisource and AIG); and the medical doctors, Czerkawski, M.D.; Mattingly, D.O., and Williams, M.D. are admissible in lieu of those witnesses' live testimony. Employer submits deposition transcripts of Claimant subject to Claimant's objections.
8. Claimant and Employer were at all relevant times in an employee/employer relationship.
9. All notices, claims, and reports that were required to be given were given in a timely fashion.
10. Employer has made no voluntary payment of compensation.

(JX 1, Tr. 8-10).

ISSUES

1. Whether Claimant's date of injury for compensation purposes was January 16, 1999 or January 23, 1999.

2. Whether Claimant suffered from costochondritis and pleurisy, which reached MMI on February 23, 1999 with no residual impairment, or whether he continues to suffer from occupational asthma.
3. Whether Employer has shown that it offered Claimant suitable alternative employment prior to his MMI date.

FINDINGS OF FACTS

Claimant, a twenty-nine year old male, began to work as a welder for Employer on May 4, 1998 (Ex. 10a). On January 16, 1999, Claimant was welding on a barge inside a confined space, which was ventilated from the top, when he began to experience chest pains and shortness of breath (Tr. 23-4, Ex. 25i). Before this date, he had never experienced breathing problems while welding (Tr. 23). He was using gas torches, which produce a lot of smoke (Tr. 24). While welding, he wore a respiratory mask provided by Employer, but he sometimes took it off because of the heat inside the barge (Tr. 24-5, Ex. 25g-h).

After work that evening, Claimant sought unauthorized medical treatment at the emergency room at University Hospital (Tr. 25). The emergency room physicians gave a broad diagnosis of shortness of breath (Ex. 11a, 11e). The doctor gave Claimant a slip stating that he should be off work for three days, which Claimant showed to his supervisor, Ronald Wolter (Ex. 25q). Claimant returned to work for a half-day on January 20, 1999 (Tr. 25-6).

On January 21, 1999, Claimant again began to experience chest pains while welding at work (Tr. 26). He was taken by ambulance to Baptist Medical Center at the Beaches, where he was diagnosed with pleuritic chest pain of unclear etiology (Tr. 27, Ex. 12b, 12g). On January 22, Claimant was examined at Baptist/St. Vincent's Occupational Health (Ex 27e).² The examination revealed no rhonchi, which are harsh lung sounds (Ex. 27f). Claimant's spirometry tests were normal (Ex. 27f, 14u). The diagnosis at this visit was inhalation exposure, history of pleurisy, which is inflammation of the lung lining, with early stages of pneumonia (Ex 27g, 27-1). Claimant was placed on modified duty with conditions of no dust,

² Dr. Joseph Czerkowski, a sports medicine and occupational medicine physician, reviewed the case, although it is not clear whether the examination was conducted by Dr. Czerkowski or by a physician's assistant named Michael Kring (Ex 14w, Ex 27-1). Dr. Czerkowski's testimony that "we" examined Claimant is ambiguous as to whether he personally or simply members of the clinic staff conducted the examination (Ex. 27e), while the progress note (27-1) and examination form (14w) were written by Mr. Kring.

no fume exposure, and no enclosed welding and was referred to Dr. Jim Lovett, an industrial medicine specialist (Ex 27h).

Dr. Lovett examined Claimant on January 25, 1999. His evaluation revealed normal barium and zinc levels in Claimant's bloodstream, and a normal chest X-ray (Ex. 14p, 14n). Dr. Lovett's diagnosis was non-toxic inhalation, resolving, and costochondritis, which refers to inflammation of the rib and cartilage, with pleurisy (Ex. 14m). Dr. Lovett gave Claimant restrictions against working in confined spaces for three days, qualifying him to return to regular duty on January 28, 1999 (Ex. 14m). On January 26, Claimant attempted to weld outside without a mask after being released by Dr. Lovett (Tr 45, Ex. 19xxx, Ex. 24y). Claimant testified that he had to stop after three hours because of breathing difficulties, overstress, and tightness in his chest (Tr. 45).

On January 28, 1999, Claimant followed up with Dr. Lovett, who diagnosed him with nontoxic inhalation, left costochondritis, and pleurisy (Ex. 14e, 27-1). Dr. Lovett restricted him from doing any work that required a respirator or was within confined spaces (Ex 14e).

Dr. Czerkowski examined Claimant on January 29 and found nontoxic inhalation with vapors and minimal bronchial irritation, as well as costochondritis (Ex. 27-1). Claimant received an injection of Aristocort and was restricted to inside office work (Ex. 27-1).

Mobro offered Claimant a position as an evening gate guard, which was within his restrictions (Tr. 45).³ This job paid the same as Claimant's previous job due to a company policy of not reducing employees' salaries when they were placed on light-duty work (Ex. 24j). According to Claimant's testimony, he was first scheduled to work as a guard on February 4, 1999 at 6:00 PM (Tr. 46, Ex. 19cccc). He expected to work an eight-hour shift with a thirty-minute lunch (Tr. 46). He encountered more traffic than he expected on the way to work because he was not used to working the evening shift, and consequently he arrived at 6:15 PM (Ex. 19eeee-19ffff; Tr. 49). He worked until 1:00 AM (Ex. 19ffff).

Ronald Wolter, the marine superintendent at Mobro, testified that Claimant was in fact supposed to begin an eight-hour shift at 4:30 PM (Ex. 25e, 25o). An individual named John Roland told Wolter that Claimant was approximately one hour late (Ex. 25v). One of the supervisors had to take over gate duty until Claimant arrived (Ex. 25v). Payroll records indicate that Claimant worked for a total of six hours that night (Ex. 24x).⁴ Wolter testified that

³ Ronald Wolter, Employer's marine supervisor, testified without contradiction that gate guard was a sedentary job that would not expose the employee to toxic fumes (Ex. 25x-25y). It is a necessary job that is available to injured or uninjured workers (Ex. 25y).

⁴ It appears that the time clock was operated incorrectly and that Claimant punched in at 1:00 A.M. on Thursday when he intended to punch out (Ex. 19ffff, 24x). This error was corrected and

Claimant had been informed of the time when he was supposed to report to work (Ex. 25v). Wolter further stated that Claimant was not allowed to work at the gate again because he was “deemed unreliable to show up for work” (Ex. 25v).

Claimant testified that he reported for work on February 5 and was told that “I got no more job” due to his lateness on the previous day (Ex. 19ggggg). Claimant apparently never returned to Mobro after this date. Sharon Johns, the payroll manager for Employer, testified that Claimant was supposed to be at work from February 8 to February 27, but no one heard from him (Ex. 24n). Claimant stated that he did not return or ask for his welding job back because “it’s hard to ask again when somebody throw [sic] you out” (Tr. 41).

Dr. Larry Mattingly, a board-certified pulmonologist, examined Claimant on February 11, 1999 (Ex. 26zzz-26aaaa). He diagnosed costochondritis, dorsal muscle spasm, and costochondral head tenderness (Ex. 26q). Dr. Mattingly explained in his deposition that costochondritis is an inflammation of the joints where the ribs attach to the sternum and that it could have been caused by the Claimant welding in a cramped position (Ex. 26r). He concluded that Claimant’s shortness of breath was due to anxiety and his abdominal discomfort was due to excessive intake of Motrin (Ex. 26q-r). He opined that Claimant did have a structural limitation to his breathing but no airflow obstruction (Ex. 30ggggg). It does not appear that Dr. Mattingly placed any additional restrictions on Claimant at the time of his examination (Ex. 26zzz-26aaaa).

On February 12, 1999, Claimant returned to Dr. Czerkowski, who determined that his costochondritis had resolved (Ex. 27i). Dr. Czerkowski’s office note from that appointment indicates that Claimant complained of decreased appetite, pain all over, and periodic shortness of breath (Ex. 27-1). Dr. Czerkowski concluded that Claimant’s condition was not consistent with vapor inhalation, that he displayed significant symptom magnification, and that his chest X-ray, pulmonary function, and spirometry tests had all been normal (Ex. 27-1). Dr. Czerkowski did not rule out the possibility that Claimant had industrial asthma⁵ or some form of hyperreactivity, but he did not find enough information in the records to make such a diagnosis based on his own expertise (Ex. 27r). He placed Claimant on modified duty and restricted him to no prolonged standing or walking, limited climbing, limited lifting, and no working in enclosed spaces (Ex. 27j). He referred Claimant to a pulmonologist⁶ and tentatively returned him to full duty as of February 20, 1999 (Ex. 27j, 27-1).

On February 17 and 19, Dr. Mattingly obtained spirometry and pulmonary function tests,

Claimant was punched out on Thursday at 4:43 AM. The log was then corrected by hand to indicate that Claimant worked six hours, from “W 1900”, or 7:00 PM on Wednesday, until “TH 100,” or 1:00 A.M. on Thursday (Ex. 24x).

⁵ The phrases “occupational asthma” and “industrial asthma” are used interchangeably throughout the medical records in this case.

⁶ In fact, as noted above, Claimant had already seen Dr. Mattingly on the previous day.

which he interpreted as being normal with the exception of two tests. Claimant's MVV (maximum voluntary ventilation) was only 24 liters/minute, with 170 to 144 liters/ minute being Claimant's expected range (Ex. 26aaa). His FEF (forced expiratory flow) also decreased after he was given a bronchodilator intended to improve his breathing, going from 85% of the predicted value before the bronchodilator to 36% afterwards (Ex. 26l-26m, 26eee-fff). Dr. Mattingly stated that it is not uncommon to see poorer results after the bronchodilator is given (Ex. 26n). The decline could be due to fatigue or lack of effort (Ex. 26n). Dr. Mattingly attributed Claimant's abnormal results to poor patient effort and lack of exertion, possibly due to pain from his costochondritis (Ex. 26l-m). Dr. Mattingly also noted that Claimant exhibited poor patient effort while performing cardiopulmonary tests on an ergometer(Ex. 26zz-26aaa).

Dr. Mattingly did not see Claimant again but, on February 23, 1999, sent Employer a note indicating that Claimant should weld with a mask (Ex. 26u, 26xxx). At this time, Dr. Mattingly was confident that Claimant did not have industrial asthma or any other lung problem that would keep him from working (Ex. 26ss). The instruction to wear a mask is not specific to Claimant but expresses the doctor's opinion that all welders should wear a mask as a general precaution (Ex. 26ss). Dr. Mattingly placed Claimant at MMI on February 23, 1999, with a zero permanent impairment rating (Ex. 26v).

Ronald Wolter stated that Claimant would have been hired if he had requested his welding job back at the time Dr. Mattingly released him to full-duty work (Ex. 25cc). Although Wolter would have been reluctant to hire a "prima donna" who insisted on long-term restrictions that gave him advantages over other people, he believed that Employer would have been willing, for a limited amount of time, to accommodate restrictions against welding in confined spaces (Ex.25cc).

On February 25, Sharon Johns was instructed to terminate Claimant from the payroll (Ex. 24m). The records indicate that Claimant was terminated due to lack of work (Ex. 10a, 24o). Wolter stated that, in the four years he had worked at Mobro, he did not recall a time when there was a lack of work for welders. Therefore, he thought that Claimant must have been terminated due to a lack of light-duty work (Ex. 25ii).

Claimant has held a number of jobs since leaving Mobro Marine (JX 1, Stipulations *supra*). At his deposition, he testified that he had not welded since leaving Mobro (Ex. 20III). At his hearing, he admitted that he welded for M/V Marine after leaving Mobro (Tr. 72). Vicki and Michael Gurliaccio, his employers at M/V, corroborated that he welded for them (Ex. 22, Ex. 23). Claimant worked at M/V from March 15, 1999 until May 6, 1999 (JX 1, Stipulations, *supra*). He testified that the work at M/V made his breathing problems worse. He stated that he developed bronchitis while working there and eventually quit because of his breathing problems (Tr. 54, 70). Claimant testified that he did not go back to Dr. Mattingly at this time because "[Dr. Mattingly] told me. . . that I have my improvement, he told me that I was okay"(Tr. 69).

Michael Gurliaccio testified that Claimant gave him a doctor's note stating that he had bronchitis (Ex. 23w). Gurliaccio did not know why Claimant quit his job at M/V, but he was not laid off, and there was no lack of work (Ex. 23n). He stated that Claimant welded without a mask and

never requested one. If Claimant had requested a mask, Gurliaccio would have provided it (Ex. 23o).

The next physician whose opinion appears in the record is Dr. Wendell Williams, a board-certified internist employed by the Center for Pulmonary Infectious Diseases (Ex. 30d). Dr. Williams has treated pulmonary diseases exclusively for twenty years, but he is not a board-certified pulmonologist (Ex. 30e). He examined Claimant on December 6, 1999 at the request of Claimant's attorney (Ex. 16, Ex. 30f). Based on the history given to him by Claimant, his examination, and the pulmonary function test performed by Dr. Mattingly, Dr. Williams concluded that Claimant suffered from occupational asthma, which is a form of lower airway reactivity (Ex. 16c, 30l, 30p).

Dr. Williams' report stated that Claimant had no pulmonary problems prior to his January 16, 1999 exposure, and Dr. Williams relied on this information when he formed his opinion that Claimant's problems stemmed from that incident (Ex. 16a). However, on the history form that Claimant filled out for Dr. Williams, Claimant wrote "11-12-91" next to the questions "How long have you had this problem?" and "Have you ever seen a doctor for this problem in the past?" (Ex. 30xxx). It is not clear which question Claimant was referring to with this date, and Dr. Williams apparently did not inquire (Ex. 30cc). When questioned by Employer's counsel about the significance of the 11-21-91 date, Dr. Williams stated, "I don't know. We would need to ask Mr. Lemus that" (Ex. 30cc). Claimant also informed Dr. Williams that he did not wear a mask while welding in enclosed spaces at Mobro Marine, which is contradicted by Claimant's own testimony at the hearing (EX. 30ee, Tr. 24-5). Claimant also admitted that he failed to inform Dr. Williams that he had welded after leaving Mobro (Tr. 70).

Dr. Williams testified that Claimant showed no obstructive lung problem or other indications of a predisposition to asthma (Ex. 30j). Claimant reported symptoms of occasional visual blurring, nasal congestion, intermittent coughing spells, and intermittent sputum production over the previous ten months (Ex. 16b). Dr. Williams opined that fumes to which Claimant was exposed at work could have caused him to contract asthma and that these problems were in fact related to Claimant's occupational exposure (Ex. 30k, 30hh). He testified that a single exposure, even a brief one, could be sufficient to cause a patient to develop life-long asthma (Ex. 30v, 30hh).

On the date when Dr. Williams examined Claimant, Claimant was healthy and did not show any "specific abnormalities" (Ex. 30l). Dr. Williams stated that a patient with occupational asthma could appear symptom free when not exposed to irritants (Ex. 30m). A patient with occupational asthma could also have normal lung function tests, like those conducted by Dr. Mattingly on February 17, 1999 (Ex. 30n).

Dr. Williams noted Claimant's FEF test showed a twenty-six percent drop in airflow after he was exposed to a bronchodilator (Ex. 30p, 30ttt). He believed that Claimant suffered a minor asthmatic reaction due to the bronchodilator (Ex. 30p, 30x). Normally, bronchodilator treatment will improve expiratory airflow. However, sometimes it will reduce airflow in patients with asthma

(Ex. 30p). Dr. Williams acknowledged that the fall in airflow could be caused by poor patient effort (Ex. 30p). He reviewed the flow volume loops from the test and believed that the early part of the loops was reliable (Ex. 30q). Therefore, he concluded that Claimant's abnormal result was due to asthma (Ex. 30q). He did not find that Claimant continued to suffer from costochondritis (Ex. 30jjj).

DISCUSSION

I. Date of Injury

Claimant testified without contradiction that he suffered shortness of breath and chest pains on January 16, 1999 (Tr. 23-4). He missed the next three days from work on the doctor's orders due to this injury, and he was once again transported to the hospital with similar symptoms on January 21, 1999 (Tr. 24-6, Ex. 25q). The parties have stipulated that Claimant suffered a compensable injury on one of these dates (JX-1). Although Employer did not authorize the first visit, there is no evidence of record that rebuts Claimant's testimony regarding his symptoms. In fact, his testimony is supported by emergency room records (Ex. 11). January 16, 1999 is the correct date of injury. Therefore, as stipulated, Claimant's average weekly wage for purposes of compensation is \$539.85 (JX-1).

II. Claimant's Medical Condition

Employer concedes that the costochondritis and pleurisy for which Claimant was treated between January 16, 1999 and February 22, 1999 were work related (JX-1). However, Employer disputes Claimant's contention that he continues to suffer from occupational asthma as a result of the on-the-job exposure.

The section 20(a) presumption does not assist a claimant in proving the fact of injury. Kelaita v. Triple A Machine Shop, 13 BRBS 326, 331 (1981). The Benefits Review Board has stated that this is an issue on which the claimant is more capable of producing evidence than the employer, and, therefore, it is properly litigated without the benefit of the presumption. Id. Therefore, Claimant must prove the existence and extent of his occupational asthma. I find that Claimant has not met this burden.⁷

⁷ The 20(a) presumption does not apply to the existence of working conditions that could have caused an injury. Kelaita v. Triple A Machine Shop, 13 BRBS 326, 331 (1981). Because I find that Claimant does not suffer from industrial asthma, I need not decide whether Claimant actually worked in conditions could have caused such an ailment.

Dr. Williams was the only physician to diagnose Claimant with industrial or occupational asthma, or from any form of asthma at all (Ex. 16c). Dr. Czerkowski admitted the possibility that Claimant might suffer from some type of asthma, but he could not reach a conclusion based on his expertise (Ex. 27r). Dr. Mattingly, the only board-certified pulmonologist to examine Claimant, was confident that Claimant did not suffer from asthma or any type of lung ailment as of February 23, 1999 (Ex. 26v).

Dr. Williams stated that his diagnosis was based on three factors: the history that Claimant related to him, his own examination of Claimant, and one of many pulmonary function tests that Claimant underwent (Ex. 30l, 30p). None of these three factors is persuasive.

The record is clear that Claimant misrepresented his history to Dr. Williams. Claimant told the doctor that he never wore a mask while welding at Mobro, which was contrary to Claimant's own testimony at the hearing (Ex. 30ee, Tr. 24-5). Claimant told Dr. Williams that he had not welded at all after leaving Mobro, when in fact he welded at M/V Marine for over a month without using, or even requesting, a mask (Tr. 70, Ex. 23o). Dr. Williams stated that Claimant's lack of breathing problems prior to his on-the-job exposure was one factor in his diagnosis, but he ignored evidence in his own records that Claimant had seen a doctor for similar problems in 1991 (Ex. 30cc, 30xxx). These misrepresentations and inconsistencies cast severe doubt on the reliability of the history that Claimant gave to Dr. Williams and, consequently, on Dr. Williams's diagnosis.

Dr. Williams' own examination of Claimant showed no "specific abnormalities" (Ex. 30l).

In diagnosing the patient, Dr. Williams referred to a number of symptoms that he had not personally observed, including coughing and sputum production (Ex. 30l). He apparently relied on these reported symptoms and on his opinion that a patient with industrial asthma may appear symptom-free when not exposed to irritants (Ex. 30m). This possibility, however, is not affirmative evidence that Claimant suffers from such condition. Furthermore, even if I believed the reported symptoms of a claimant with severe credibility problems, Dr. Williams has not presented sufficient evidence to link these symptoms to occupational asthma.

The only remaining basis for Dr. Williams' diagnosis is the decline in the results of Claimant's FEF test (Ex. 26l-26m, 30p, 30ttt). Dr. Williams speculated that this decline was due to an asthmatic reaction that caused Claimant's lungs to contract rather than expand when given a bronchodilator (Ex. 30p, 30x). However, he admitted that this result could also be due to poor patient effort (Ex. 30p). Dr. Mattingly, who actually conducted the test, attributed the result to poor effort and lack of exertion (Ex. 26l-26m). Dr. Mattingly, a board-certified pulmonologist, is the more qualified physician, and he had an opportunity to observe Claimant at the time of the testing (Ex. 26l-26m). He noted several other indications of poor patient effort of which Dr. Williams was apparently not aware (Ex. 26zz-26aaa). At about the same time, Dr. Czerkowski observed that Claimant exhibited significant symptom magnification (Ex. 27-1). The doctors who treated Claimant at the time when the tests were conducted are in a better position to evaluate Claimant's effort level than is Dr. Williams, who had no interaction with Claimant until almost ten months later.

(Ex. 16).

For the above reasons, I find that Dr. Williams' opinion was unreasoned and is entitled to less weight than Dr. Mattingly's opinion. I find that Claimant reached MMI, as Dr. Mattingly testified, on February 23, 1999. Because Claimant has shown no continuing injury or harm after that date, he is entitled to no benefits after that date, either for medical care or lost earning capacity.

III. Suitable Alternative Employment

Employer argues that it provided Claimant with suitable alternative employment when it offered him an opportunity to weld outside enclosed spaces, beginning on January 26, 1999 (Ex. 24y). Although this job was within the restrictions that Claimant had received at that time, Claimant reported that he was unable to complete the work due to breathing difficulties and chest pains (Tr. 45). Four days later, Dr. Czerkowski restricted Claimant to inside office work, a restriction that remained in place until February 12 (Ex. 27-1). These changes in restrictions indicate that, as of January 26, Claimant was suffering an ongoing problem, the extent of which had not been fully determined. Therefore, I find that Employer has not shown that outside welding work was suitable for Claimant prior to his MMI date of February 23, 1999.

However, I find that Employer ultimately prevails on the issue of suitable alternative employment beginning on February 4, 1999. On this date, Employer offered Claimant light duty work as a gate guard paid at the same rate that he had been paid prior to his injury (Tr. 46, Ex. 19cccc, 24j). Claimant was discharged from this work for reasons unrelated to his injury. He was informed that he should start his job at 4:30 PM but did not arrive until 6:15 PM (Tr. 49, Ex. 25o). He stated that he thought the shift began at 6:00 PM (Tr. 46).⁸ A supervisor had to fill in for Claimant until he arrived (Ex. 25o). Employer discharged Claimant from the gate-guard job because his supervisors determined that he was not reliable (Ex. 25o). Claimant was ultimately discharged from all employment at Mobro due to lack of light duty work (25ii), but such work would have been available had Employer not deemed Claimant to be unreliable due to his lateness.

An employer will not prevail on the issue of suitable alternative employment if it offers a claimant hypothetical light-duty work that is not actually available to him. Mendez v. National Steel and Shipbuilding Co., 21 BRBS 22 (1988). However, the employer has met its burden if it can show that light duty work was unavailable to Claimant due to his own misfeasance. Brooks v Newport News Shipbuilding and Dry Dock Co., 26 BRBS 1 (1992) (claimant discharged for falsifying application). See also Walker v. Sun Shipbuilding and Dry Dock Co., 12 BRBS 133 (1980), vacated and remanded mem. 642 F.2d 445 (3d Cir. 1981), decision following remand,

⁸ Claimant himself testified that he was scheduled to work an eight hour shift with a half-hour break, and he left at 1:00 AM (Tr. 46, Ex. 19ffff). These facts are consistent with Wolter's testimony that Claimant's shift was scheduled to begin at 4:30 PM.

19 BRBS 171 (1986) (claimant discharged for bringing weapon on premises); Harrod v. Newport News Shipbuilding and Dry Dock Co., 12 BRBS 10 (1980) (claimant discharged for violating company rule). In such a case, the discharge is not due to the claimant's disability resulting from his work-related accident. Brooks at 6.

In the instant case, it is undisputed that Claimant was physically capable of serving as a gate guard (Ex. 25x-25y). Although Claimant attempted to excuse his tardiness, he did not dispute that it was the reason Employer removed him from the guard position (Tr. 49, Ex. 19ffff-19gggg). I credit Wolter's testimony that Claimant was informed of his work schedule and that he failed to arrive on time, thus disrupting the work schedule of his supervisor (Ex. 25v). I cannot find that an employer acts unreasonably when it insists that an employee be prompt and be aware of his work duties. Employer has met its burden to show suitable alternative employment and Claimant is, therefore, entitled to no benefits for lost earnings due to his injury. Because Employer has shown that it made suitable work available to Claimant, I need not consider the testimony of Jerry Albert regarding Claimant's wage-earning capacity (Tr. 102-63).

ORDER

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary total disability compensation for any time missed due to his work-related costochondritis and pleurisy between January 16, 1999 and February 4, 1999, at a rate of \$359.90 per week.
2. Claimant's claim for medical benefits and for disability compensation for all other periods is DENIED.
3. Employer shall pay interest at the treasury-bill rate specified in 28 U.S.C. 1961 in effect when this decision and order is filed with the Office of the District Director on all accrued unpaid benefits, if any, computed from the date on which each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).
4. Within thirty (30) days of receipt of this decision and order, Claimant's attorney shall file a copy of a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel, who shall then have twenty days to respond thereto.

FEC/cmp
Newport News, Virginia

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge